87-475

Supreme Court, U.S.
FILED
SEP 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Petitioners,

vs.

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE COURT OF APPEALS FAILED TO RECOGNIZE THAT A DECISION OF THE SUPREME COURT OF FLORIDA TERMINATING THE RIGHT TO A TAX REFUND BEFORE THE APPLICABLE STATUTE OF LIMITATION FOR FILING CLAIMS FOR THE REFUND HAD EXPIRED, IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

II

WHETHER THE COURT OF APPEALS FAILED TO RECOGNIZE THAT A DECISION OF THE SUPREME COURT OF FLORIDA TERMINATING THE RIGHT TO A TAX REFUND BEFORE THE APPLICABLE STATUTE OF LIMITATION FOR FILING CLAIMS FOR THE REFUND HAD EXPIRED, IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

LIST OF PARTIES IN THE COURT OF APPEALS, ELEVENTH CIRCUIT

Andrew J. Rodnite and Ellen M. Rodnite	individually and on behalf of the class of Florida taxpayers they represent. Plaintiffs-appellants.
O. Sanford Jasper and Ronald J. Schultz	as tax collector and property appraiser respectively of Pinellas County, Florida, and as the respective representatives of the classes of county tax collectors and property appraisers.

The named defendant D. Robert Graham, as Governor, and other state officials were dropped as defendants in the district court.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,

Petitioners,

vs.

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners ANDREW J. RODNITE and ELLEN M. RODNITE, respectfully urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit rendered on May 4, 1987, rehearing denied June 18, 1987.

OPINION BELOW

The decision which Petitioners seek to have reviewed is an unpublished decision dated May 4, 1987. A copy is appended hereto as App. 1.

JURISDICTION

The judgment sought to be reviewed is final and dated May 4, 1987. Petitioners' petition for rehearing was denied June 18, 1987. Copies are appended hereto as App. 8 and 10.

Jurisdiction for this Court to review by certiorari is conferred by 28 USC §1254.

Jurisdiction in the District Court over both Petitioners and Respondents was pursuant to 28 USC §1331.

Jurisdiction of the Eleventh Circuit Court of Appeals was pursuant to 28 USC §1291.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I

Petitioners Andrew J. Rodnite and his wife Ellen M. Rodnite, as new Florida residents, brought this class action in a federal court to recover Florida real estate taxes illegally collected from them and other new Florida residents during the years 1980, 1981 and 1982. During those years approximately 300,000 new residents of Florida were illegally charged about $300,000,000 in excess taxes on their new homesteads in Florida. The Rodnites brought the action in a federal district court in Florida after the Florida Supreme Court declared the taxes illegal but simultaneously cut off the only judicial remedy available in the Florida courts to recover the taxes.

The federal district court dismissed the complaint on grounds of comity and the Court of Appeals for the Eleventh Circuit affirmed on the same basis. App 1.

II

The Florida constitution (Article VII, Section 1(a)) prohibits the state from collecting real estate taxes. All such taxes go into the treasuries of the local counties.

Like other states, Florida has a constitutional provision exempting homesteads from taxation. Prior to 1980 each Florida homestead was exempt from real estate taxes for the first $5,000 of its valuation. By constitutional amendment in 1980 the exemption was increased to $15,000 in 1980, $20,000 in 1981 and $25,000 thereafter. The state legislature was given power to implement the

increases by general law (Article VII, Section 6(d), Florida Constitution). In implementing the increases, however, the legislature denied the increased homestead benefits to new residents of Florida for the first five years of their residency. This constituted an obvious burden on the federal constitutional right to travel from one state to another.

This discriminatory legislation was immediately challenged in the Florida courts in a number of test cases based on both federal and state constitutional grounds. On December 16, 1982, the Florida Supreme Court held the legislation (Section 196.031(3)(d)-(e), Fla.Stat. (Supp. 1980)) to be unconstitutional and void *under the Florida constitution. Osterndorf v. Turner,* 426 So.2d 539 (Fla. 1982). The federal constitutional challenge was not addressed although it was before the court. See 411 So.2d 330, 335 (Fla. 5th DCA 1982) (Same case in lower appellate court where both the federal and the state constitutional challenges were rejected and the whole matter then certified to the Supreme Court of Florida).

Although holding the discriminatory statute void under the Florida constitution, the Florida Supreme Court nevertheless denied recovery of the approximately $300,000,000 in real estate taxes except to a handful of people. Without express reference to any statute of limitation, the court stated that all who had not claimed a refund before it announced its decision were too late.

> "Our decision in this case is prospective only for the taxable year commencing January 1, 1983, except for those taxpayers who have timely judicially challenged the applicability of the residence requirement. . . . The petitioners in this case, however, are entitled to

> a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption, *as are any other litigants who have timely judicially challenged the statute.*"
>
> 426 So.2d at 545 (emphasis added).

Presumably the court had in mind the short 60-day Florida statute of limitation applicable to actions to correct errors in tax rolls, Section 197.171(2), Fla.Stat. (1985).

Florida, however, has *two* periods of limitation for recovery of taxes depending upon whether the defect in the tax is merely an irregularity on the tax rolls (the short 60-day period) or the taxing statute itself, as in the present case, is unconstitutional and void (a *four-year* period).

> "However, this sixty-day statute of limitations is applicable only to those cases in which the assessment is challenged as being *voidable*. It is well-established that the limitation period does not apply to the filing of complaints which challenge an assessment as being *void* or unauthorized."
>
> *Neptune Hollywood Beach Club, Inc. v. Markham,* 473 So.2d 691 (Fla. 4th DCA 1985) (emphasis added), citing a Florida Supreme Court case.

Where a tax refund is sought because the tax is void, the general period of limitation controls and not the short sixty-day period for correcting the tax rolls. *Reynolds Fasteners, Inc. v. Wright,* 197 So.2d 295 (Fla. 1967). At all times here involved that general period was four years:

> "(b) Those refunds which have been ordered by a court and those refunds which do not result from

> changes made in the assessed value of a tax roll certified to the tax collector shall be made directly by the tax collector. . . .
>
> "(c) . . . No refund shall be granted unless claim is made therefor within 4 years of January 1 of the tax year for which the taxes were paid."
>
> Section 197.0138(1)(b)-(c), Fla.Stat. (1985).

Since the Florida Supreme Court's decision was rendered in 1982, the four-year general period of limitation had not run on any of the $300,000,000 in illegal taxes which the county tax collectors had begun to collect on the homesteads of new Florida residents beginning in 1980. On the other hand, by December 16, 1982, when the decision was handed down, the short 60-day period had run for making objections to the 1982 tax rolls, since the Florida statutory scheme contemplates that the tax rolls will have been completed by July 1 of each year. Section 193.1142 Fla. Stat. (1985). Thus the only taxpayers allowed any refund were the few who had filed an action challenging the annual tax roll itself within 60 days after it became final, either in 1980, 1981 or 1982. The thousands of new residents who had awaited the outcome of the test cases were told by the court that they had waited too long to participate in the refunds.

In their complaint filed in the district court the Rodnites alleged that they prudently awaited the *Osterndorf* decision, only to learn from that decision that the homestead tax was illegal but that the right of recovery under the four-year statute of limitation had been taken away.

REASONS WHY WRIT OF CERTIORARI SHOULD BE ISSUED

I

Whether the Court of Appeals Failed to Recognize That a Decision of the Supreme Court of Florida Terminating the Right to a Tax Refund Before the Applicable Statute of Limitation for Filing Claims for the Refund Had Expired, Is a Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

This court's June 14, 1982 decision in *Zobel v. Williams*, 457 U.S. 55 (1982) intervened between the Florida intermediate appellate court's March 24, 1982 decision and the Florida Supreme Court's December 16, 1982 decision in the *Osterndorf* case. The intermediate appellate court rejected both the federal and the state constitutional challeges and upheld the discriminatory tax against new Florida residents. The Florida Supreme Court said that federal cases are

> "relevant and persuasive to the consideration of whether Florida's equal protection clause [in the Florida Constitution] has been violated," 426 So.2d at 543,

and noted that

> "five justices [of the court in *Zobel v. Williams*] believed that the Alaska scheme [of favoring old residents over new residents in financial matters] was unconstitutional as infringing upon the right to travel, in violation of the privileges and immunities clause." *Ibid.*, 544.

The Florida Supreme Court then decided that the discriminatory homestead tax treatment of new Florida residents violated the Florida equal protection clause. *Ibid.*, 545. It thereby avoided the challenges to the law on federal grounds.

The Florida court then cut off the tax refund remedy provided by Florida law with a general four-year statute of limitation. Its decision thereby collided with this court's decision in *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673 (1930). In *Brinkerhoff* the trust company sued the Treasurer of Henry County, Missouri (Hill) to recover taxes wrongfully collected. The Supreme Court of Missouri ruled that the taxes were wrongfully collected and that the trust company was entitled to a refund. It held, nevertheless, that the taxes could *not* be recovered because the only procedure for recovering them was by that time barred by the applicable Missouri statute of limitation. In identifying the time-barred procedure as the only remedy the court reversed a prior case which had held that a different remedy, which the trust company had invoked, was the only correct one. Accordingly, the trust company found itself in the position of the Rodnites here, of having followed a previously correct procedure which was held to be incorrect only after the "correct" procedure was time-barred.

Speaking for this court in reversing the case for further proceedings which would accord due process to the trust company, Mr. Justice Brandeis said that

> ". . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due

> process of law. *Whether acting through its judiciary or through its legislature*, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him *some real opportunity to protect it.*"
>
> *Ibid.*, 682 (emphasis added).

Neither in the opinion in this case (App. 1) nor in the related case of *Winicki v. Mallard*, 783 F.2d 1567 (11th Cir. 1986), to which the opinion referred, was there any mention of the four-year Florida statute of limitation applicable to the refund of void taxes.

Accordingly, certiorari should be granted and the judgment of the Court of Appeals reversed for its failure to grant federal relief to the Rodnites and the class of new Florida residents whom they represent.

II

Whether the Court of Appeals Failed to Recognize That a Decision of the Supreme Court of Florida Terminating the Right to a Tax Refund Before the Applicable Statute of Limitation for Filing Claims for the Refund Had Expired, Is a Violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

In *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), a statute of Illinois, as construed by its Supreme Court, cut off all claims of employment discrimination which had not been processed to completion by the state Fair Employment Practices Commission at the end of 120 days, a circumstance over which no claimant

had any control. Logan's claim was dismissed with prejudice because it had not been processed to completion at the end of 120 days. Under principles announced in *Brinkerhoff,* the court in *Logan* found that Logan had been deprived of due process of law under the Fourteenth Amendment because his only remedy was cut off upon a condition over which he had no control. In a separate concurring opinion expressing the views of four members of the court Justice Blackmun, who wrote both the majority and the concurring opinions, stated that the Illinois law also violated the equal protection clause because it created two classes of claimants—those whose claims were processed to completion and appropriate relief granted within 120 days, and those whose uncompleted claims at the end of 120 days were "unceremoniously and finally terminated," 455 U.S. at 439, depriving the latter class of the equal protection of the law with respect to their claims.

Applying the *Logan* concurring opinion to the facts of this case, the *Osterndorf* decision denied the Rodnites and other new Florida residents the equal protection of the law. By arbitrarily cutting off the four-year Florida statute of limitation for the refund of void taxes, the Florida Supreme Court created two classes of claimants, those few who had commenced test cases as soon as possible and the great majority who had awaited the outcome of the test cases while relying upon the general four-year statute of limitation. This was a flagrant denial of equal protection.

The Florida Supreme Court sought to buttress its decision by an equitable argument that the discriminatory tax on new residents had been enforced in good faith by the local tax collectors of the state:

> "Because the enhanced tax exemption for residents of less than five years has been denied in good faith reliance on a presumptively valid statute, we find that the taxpayers, *other than those who challenged the statute,* who were denied the enhanced exemption are not entitled to a refund. See Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973)."
>
> 426 So.2d at 545 (emphasis added).

Neither *Gulesian v. Dade County School Board* which *Osterndorf* cites as its only authority, nor *Lemon v. Kurtzman,* 411 U.S. 192 (1973) which *Gulesian* cites, 281 So.2d at 327, support this result. In both of those cases a tax refund was denied *altogether* to *all* taxpayers on equitable grounds. Here the Florida court expressly ruled that the void tax was refundable but only to those who had "timely" sought it, thus creating two classes of taxpayers, those few who recovered the tax and the rest who could not.

Accordingly, on equal protection grounds also, certiorari should be granted and the judgment of the Court of Appeals reversed for its failure to grant federal relief to the Rodnites and the class of new Florida residents whom they represent.

Respectfully submitted,

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APPENDIX

DO NOT
PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-3362 & 86-3487
Non-Argument Calendar

ANDREW J. RODNITE, and ELLEN M. RODNITE, His Wife, individually and on Behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(May 4, 1987)

Before HILL, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

In a class action under 42 U.S.C. § 1983, the appellants seek to compel the repayment of Florida real estate taxes collected pursuant to Section 196.03(3)(e), Florida Statutes, which provided for enhanced homestead exemption benefits for residents of five years or more. The Florida

Supreme Court declared the statute unconstitutional as violative of the equal protection provision (Article I, Section 2) of the Florida Constitution. *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982). The decision provided, however, that relief was prospective only and limited recovery of tax benefits to those residents who had timely judicially challenged the statute by filing an action prior to the date of the *Osterndorf* decision (December 16, 1982). The Rodnites, who had not filed prior to that date, now challenge the *Osterndorf* decision as depriving them of constitutional rights.

We find that this case is directly controlled by our recent decision in *Winicki v. Mallard*, 783 F.2d 1567 (11th Cir. 1986), which presented the same issue. There, this court held that the principle of comity barred federal action. Accordingly, we AFFIRM the judgment of the district court dismissing the case.[1]

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1. We note that a jurisdictional [sic] raised *sua sponte* was carried with the case. Because of our decision on the merits, we need not address this question

(Filed December 11, 1985)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-1358-Civ-T-13

ANDREW J. RODNITE, et al.,
Plaintiffs,

vs.

D. ROBERT GRAHAM, etc., et al.,
Defendants.

ORDER

This cause comes before the Court upon the motions to dismiss and motions for summary judgment filed by the defendants. This action is DISMISSED.

In 1982, the Florida Supreme Court found that those portions of Florida Statute section 196.031, that gave an enhanced tax exemption only to those taxpayers who had been Florida residents for at least five years unconstitutional under the Florida Constitution's equal protection clause, Florida Constitution, article I, section 2. *Osterndorf v. Turner,* 426 So.2d 539 (Fla. 1982). That decision, although granting a refund of taxes to the plaintiffs in that action, limited such retroactive relief to those who had timely challenged the denial of an enhanced

exemption. The present action seeks to circumvent that Florida Supreme Court decision by alleging an action under 42 U.S.C. §§1981, 1983, 1985(2), (3), and 1986 against those who were allegedly responsible for denial of the tax exemption. Specifically, the complaint names D. Robert Graham, as Governor of the State of Florida, Ralph Haben, former speaker of the Florida House of Representatives and as a representative of the Florida Legislature, Randy Miller, as Executive Director of the Department of Revenue, State of Florida, Ronald J. Schultz, as Property Appraiser for Pinellas County, Florida, individually, jointly, severally and/or in the alternative, in their official and representative capacities as officers, agents and/or employees of the State of Florida.

The Florida Supreme Court found that "the enhanced tax exemption for residents of less than five years [was] denied in good faith reliance on a presumptively valid statute." *Osterndorf*, 426 So.2d at 545. This Court will not consider argument challenging that finding. All of the named defendants are therefore protected from individual liability because of their good faith enforcement of state law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Whether the challenged statute also violates the federal constitution, thus supporting this action under various federal statutes, need not be decided. The fact that the damages sought are in the nature of a "refund" and would have a direct impact on the state of Florida's treasury brings into play the protection afforded states by the United States Constitution's Eleventh Amendment. As observed by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 918 (1984):

"The Eleventh Amendment is an explicit limitation on the judicial power of the United States." *Missouri v. Fiske,* 290 U.S. at 25, 54 S.Ct., at 20. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 U.S.C. §1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution. *See Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Similarly, if a §1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting a relief on that claim. *See Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curriam* [sic]). The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts.

DISMISSAL of this action is therefore appropriate.

DONE AND ORDERED in Chambers at Tampa, Florida, this 10th day of December, 1985.

/s/ George C. Carr
United States District Judge

(Filed May 7, 1986)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-1358-Civ-T-13

ANDREW J. RODNITE, et al.,
Plaintiffs,

vs.

D. ROBERT GRAHAM, etc., et al.,
Defendants.

ORDER

Upon consideration of the arguments raised in the plaintiff's petition for rehearing and the response filed by defendants Schultz and Jasper, this Court declines to vacate its Order dismissing this case. In addition to finding that this action is barred by the Eleventh Amendment because imposition of the award of damages sought would amount to an award of damages against the state treasury, see *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 918 (1984), this Court is bound to apply the rationale set out in *Winicki v. Mallard*, No. 85-3692, slip op. (11th Cir. March 13, 1986). *Winicki v. Mallard, supra*, raised the same issues as those in the case at bar. The *Winicki* Court affirmed a district court's finding that Florida's state remedies were adequate and that principles of comity prevented the maintenance of the suit in federal court. *Id.* at 2403. *See also Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 116

(1981) ("taxpayers are barred by the principle of comity from asserting Section 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court").

The clerk is directed to close this case.

DONE AND ORDERED in Chambers at Tampa, Florida, this 7th day of May, 1986.

/s/ George C. Carr
United States District Judge

(Entered May 4, 1987)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-3362
86-3487
Non-Argument Calendar

D.C. Docket No. 85-1358

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

---

Before HILL, KRAVITCH and JOHNSON, Circuit Judges.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered:

May 4, 1987

For the Court:
Miguel J. Cortez,
Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: JULY 13, 1987

(Filed June 18, 1987)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3362

ANDREW RODNITE and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

D. ROBERT GRAHAM, as Governor of the State of Florida, RALPH HABEN, etc., et al.,
Defendants-Appellees.

No. 86-3487

ANDREW RODNITE and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 4, 11 Cir., 1987, ... F.2d .....).

Before HILL, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

Supreme Court, U.S.
FILED
OCT 13 1987
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CLERK

No. 87-475

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OCTOBER TERM, 1986

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW
(Restated)

I

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT THE PETITIONERS' COMPLAINT WAS BARRED BY THE DOCTRINE OF COMITY AND THAT FEDERAL JURISDICTION SHOULD BE DECLINED.

LIST OF PARTIES IN THE COURT OF APPEALS, ELEVENTH CIRCUIT

The Respondent accepts the Petitioners' List of Parties but would point out that the class action status of the Rodnite complaint was never ruled upon as was not the question of class representation. Thus the Rodnites only *sought* to represent a class and *sought* to have these respondents declared representative of a class of defendants.

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United States Constitution

Fourteenth Amendment 4

No. 87-475

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Petitioners,

vs.

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE
(Restated in part)

Except for those statements which lapse into argument (which statements Respondent is certain this Court will recognize for what they are) the Respondent does not take issue with the Petitioner's Statement of the Case—except as follows.

On page 5 the Petitioner states Florida has two periods of limitations governing challenges to taxes and for any refund of taxes mistakenly paid or wrongfully extracted.

Respondent would point out that rather than two, there are three periods of limitations in Florida:

1) Section 194.171(2), Fla. Stat. (1985) provides a court suit challenging a tax assessment may be filed by any disgruntled taxpayer within 60 days of the date the tax roll is certified. The 60 day limit is jurisdictional.

2) Florida case law provides that a constitutional challenge to a taxing statute can be mounted at any time. *Neptune Hollywood Beach Club, Inc. v. Markham*, 473 So.2d 691 (Fla. 4th DCA 1985).

3) An administrative claim for a refund of taxes can be made under the provisions of Section 197.0138 (now 197.182 eff. 1985), Fla. Stat., at any time not exceeding four years from January 1 of the tax year in which the taxes were paid.

This is the "4 year period of limitations" to which the Rodnites repeatedly refer in their Petition.

In 1982 the statute provided in pertinent part:

197.0138 DEPARTMENT OF REVENUE TO PASS UPON AND ORDER REFUNDS.

(1)(a) Except as provided in paragraph (b), the department shall pass upon and order refunds when payment of taxes assessed on the county tax rolls has been made voluntarily or involuntarily under the following circumstances:

1. Any overpayment . . . .

4.

(b) Those refunds which have been ordered by a court or those refunds which do not result

from changes in the assessed value on a tax roll certified to the tax collector shall be made directly by the tax collector without order from the department.

(c) Claims for refunds shall be made in accordance with the rules of the department. No refund shall be granted unless claim is made within 4 years of January 1 of the tax year in which the taxes were paid. . . .

Section 197.0138(1)-4(b)(c), Fla. Stat. (1985).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The Court of Appeals Correctly Affirmed the District Court's Finding That the Petitioner's Complaint Was Barred by the Doctrine of Comity and That Federal Jurisdiction Should Be Declined

Since the Rodnite complaint involved a state tax refund question and since it was brought pursuant to 42 U.S.C. 1983, the Courts below quite properly considered whether the complaint was barred by the doctrine of comity. Where a Section 1983 action is grounded in an allegation of an unconstitutional tax scheme, to survive dismissal the plaintiff must demonstrate that there is no plain, adequate, and complete state remedy available. The initial burden, then, is upon the plaintiff to make such a showing. Unless he is able to do so, the federal courts may properly refuse to entertain his Section 1983 action. *Fair Assessment in Real Estate Asso-*

ciation, Inc., et al. v. Gene McNary, et al., 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), p. 186.

The test of whether an adequate state remedy was available within the meaning of the doctrine of comity is not determined by reference to the time at which a given plaintiff decides to seek such a remedy.

Rather the Fourteenth Amendment requires:

> "'an opportunity . . . granted at a meaningful time and in a meaningful manner' . . ., for [a] hearing appropriate to the nature of the case," *Bodie v. Connecticut*, 401 U.S. 371, 378, as cited in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

The District Court Judge in the *Winicki v. Mallard* case (which dealt with the same issues as the Rodnite complaint) reviewed remedies available to Florida taxpayers and concluded they were adequate and complete to protect any federal constitutional rights involved. The court concluded that by the very rendering of the *Osterndorf* decision the Supreme Court of Florida demonstrated the availability of such remedies. *Winicki v. Mallard*, 615 F.Supp. 1244 (D.C. Fla. 1985), p. 1249. *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

The Appellate Court in affirming the *Winicki* District Court decision noted:

> The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. Even though a state statute has been declared unconstitutional and is no longer operational, the principles of federalism upon which the comity doctrine rests require federal courts to show restraint where retroactive relief is being sought.[1]

> The district court appropriately refused to engage in a post hoc evaluation of Florida's resolution of the controversial tax statute, recognizing that the proper relation of the federal forum to that of the state in this most critical area of state operations is governed by the principle of comity.[2] *Winicki v. Mallard*, 783 F.2d 1567 (11th Cir. 1986), p. 1571.

Petitioners urge this court to ignore comity and launch the post hoc evaluation referred to above.

Rodnites complain that except for the non-retroactive application of the *Osterndorf* decision to the mass of taxpayers in which they were included they would have had the benefit of the Florida four year administrative time limitation in which to seek a refund for "overpayment."

Rodnites assert they are in the same position as was the *Brinkerhoff Trust Company* when the Missouri Supreme Court struck down a state taxing statute, ruled that the Trust Company *was* entitled to a refund and then found any recovery was barred by a statute of limitation. There is, however, a significant distinction between *Osterndorf* and *Brinkerhoff* that obviates the necessity of considering whether the two cases are in apposition as alleged by Petitioners. In *Brinkerhoff*, the Missouri Supreme Court ruled The Trust Company *was* entitled to a refund whereas in *Osterndorf* the Florida Supreme Court ruled the Rodnites *were not* entitled to a refund. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

The Supreme Court of Florida has, as have appellate courts of other states, regarded itself as being empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective

application if considerations of fairness and justice, related to reasonable surprise called for such treatment. *Gulesian v. Dade County School Board,* 281 So.2d 325 (Fla. 1973), *Interlachen Lakes Estates, Inc. v. Snyder,* 304 So.2d 433 (Fla. 1973), *Salario v. Glaser,* 461 A.2d 1100 (N.J. 1983).

In dealing with the question of retroactivity Chief Justice Burger in this court's decision in the case of *Lemon v. Kurtzman* stated at page 1468—

> [2] The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal . . . ." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940). Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'" *Linkletter, supra,* 381 U.S., at 627, 85 S.Ct., at 1736, quoting from *Chicot County Drainage Dist., supra,* 308 U.S., at 374, 60 S.Ct., at 319. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. . . .

Further on at page 1169, Justice Burger further observed—

> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests may have constitutional roots." *Lemon v. Kurtzman*, 93 S.Ct. 1463 (1973), 411 U.S. 192, 36 L.Ed.2d 151.

Once the Florida *Osterndorf* court had reached the conclusion the taxing statute was unconstitutional, it was faced with the task of framing a decision which would deal with the scope of the application of its ruling and which took into consideration all the competing individual and public interests.

The Court found the statute had been administered by Florida public officials in good faith reliance on its validity. By referring to its prior decision in the *Gulesian v. Dade County School Board* case, the court impliedly recognized that a broad-brush, over-all retrospective application of *Osterndorf* would create a state-wide administrative and fiscal nightmare involving some 300,000 individual taxpayers, 67 counties and their attendant fiscal operations as well as the return of some $300,000,000.00 (three hundred million dollars), all of which had already been spent or was budgeted. *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

As Judge Moore pointed out in the District Court's decision in *Winicki v. Mallard*,

> "A more chilling effect upon the fiscal operation of state government cannot be imagined." *Winicki v. Mallard*, 615 F.Supp. 1244, p. 1248 (D.C. Fla. 1985).

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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